Docket No. 12-55733

In the

United States Court of Appeals

For the

Ninth Circuit

MAREI VON SAHER,

Plaintiff-Appellant,

v.

NORTON SIMON MUSEUM OF ART AT PASADENA
and NORTON SIMON ART FOUNDATION,

Defendants-Appellees.

Appeal from a Decision of the United States District Court for the Central District of California, No. 07-CV-02866-JFW-JTL · Honorable John F. Walter

BRIEF OF APPELLANT

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I. INTRODUCTION

Appellant Marei von Saher ("Marei") brought this action to recover artworks looted by the Nazis during World War II and now in the possession of a California museum. The District Court held that Marei's common law claims for the return of the artworks are preempted by the foreign affairs doctrine, basing its decision upon an incorrect construction of an amicus brief submitted by the Acting Solicitor General (the "S.G.") to the Supreme Court in this matter and an incorrect interpretation of federal policy.

Having previously found that the statute of limitations under which this action was originally brought, Cal. Code Civ. Proc. ("CCP") §354.3, is preempted by the Federal Government's exclusive power to conduct foreign affairs, the District Court has now concluded that Marei's common law claims for the restitution of Nazi-looted art are barred in their entirety, also by the foreign affairs doctrine. The District Court finds support for its new decision in the May 2011 Brief for the U.S. as Amicus Curiae submitted in this action by the S.G. and the State Department on the issue of the constitutionality of §354.3[1] (E.R. 7-9)[2] (the

[1] The S.G. submitted its brief at the Supreme Court's request in connection with Marei's petition for a writ of certiorari to review *Von Saher v. Norton Simon Museum of Art*, 592 F.3d 954 (9th Cir. 2010) ("*Von Saher I*"). The petition was denied.

"S.G.'s Brief"), **despite the fact that the S.G. stated that the common law claims could proceed for determination on the merits**.

Although the S.G. took the position that §354.3, a statute that specifically targeted Holocaust claims, was unconstitutional (E.R. 520-21), he did not say that U.S. policy preempted Marei's common law claims. Rather, he asserted that a grant of certiorari to consider the question of preemption was not needed because the claims could proceed under the generally applicable statute of limitations for stolen property claims. The S.G. stated that:

> the court of appeals' preemption holding may not be decisive even in this very case, because that court remanded to determine whether petitioner's claim is timely under another California statute of limitations for actions to recover personal property . . . . It is thus possible that on remand petitioner's action will be deemed timely. Two courts of appeals have held that application of general state statutes of limitations to claims seeking recovery of Holocaust-era artwork does not impermissibly intrude upon federal foreign affairs authorities.

(E.R. 532-33) (citing *Museum of Fine Arts v. Seger-Thomschitz*, 623 F.3d 1, 12-13 (1st Cir. 2010), *cert. denied*, 131 S. Ct. 1612 (2011); *Dunbar v. Seger-Thomschitz*, 615 F.3d 574, 578-79 (5th Cir. 2010), *cert. denied*, 131 S. Ct. 1511 (2011)). Thus, even though both the S.G. **and this Court** in *Von Saher I* expressly indicated that this case could proceed to be heard on the merits if Marei's common law claims

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[2] References to "E.R. __" are to the cited page(s) in Appellant's Excerpts of Record filed herewith.

were timely under the general statute of limitations,[3] the District Court found that those claims are preempted.

Moreover, even if the policy that preempted §354.3 applied to common law claims, the District Court made premature findings of fact to the effect that the artworks sought in this case were previously the subject of bona fide restitutions proceedings in the Netherlands. Consequently, the District Court concluded that any lawsuit brought to restitute those artworks to the heirs of the Jewish family from whom they were looted by Nazi Reichsmarschall Hermann Göring in 1940 is preempted by the foreign affairs doctrine. The District Court's premature findings of fact on this motion to dismiss were based solely on assumptions about the facts made in the S.G.'s Brief. The District Court erred, not by giving deference to the policy statement made by the S.G., but by giving deference to and accepting the S.G.'s erroneous factual assumptions as if they, too, were policy.

The District Court also mistakenly concluded that this case implicates foreign affairs. To the contrary, the only decision the Court must make in this case is whether any act divested Marei of title to the artworks or conveyed title to

[3] After the Ninth Circuit's decision in this case, but before the S.G. submitted his brief in May 2011, California amended its general statute of limitations for the recovery of, among other things, stolen art to provide that the limitations period for such claims is six years from actual discovery by the plaintiff of the whereabouts of the art. Appellees did not argue that this generally applicable statute of limitations is preempted by the foreign affairs doctrine.

another. This exercise is well within the province of the courts, and the case should be remanded to the District Court for this purpose.

Finally, in an intervening decision, *Cassirer v. Thyssen-Bornemisza Collection Foundation*, No. 2:05-CV-03459-GAF-E (C.D. Cal. May 24, 2012), a different California District Court judge has held the general California statute of limitations applicable to this case unconstitutional under the foreign affairs doctrine. This decision was in error and cannot be used by Appellees to claim that Marei's case must be dismissed, though we anticipate that they will try to do so on appeal despite failing to make this argument below.

II. JURISDICTIONAL STATEMENT

Marei filed her complaint in the United States District Court for the Central District of California on May 1, 2007 (the "Complaint"). By order dated October 18, 2007, the District Court dismissed the Complaint. By amended decision and order dated January 14, 2010, the Ninth Circuit Court of Appeals affirmed in part and reversed in part, granted the plaintiff leave to amend her Complaint, and remanded the case to the District Court. *Von Saher I* at 957. Issuance of the mandate was stayed pending a petition for certiorari to the United States Supreme Court. Certiorari was denied on June 27, 2011, and the mandate issued on September 7, 2011.

Marei filed her First Amended Complaint (the "FAC") in the District Court on November 8, 2011. The District Court has jurisdiction over the subject matter of the claims set forth in the FAC pursuant to federal diversity jurisdiction under Article III, Section 2 and Article I, Section 9 of the United States Constitution, and under 28 U.S.C. §1332, as the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and there is complete diversity of citizenship between Appellant, a citizen of the State of Connecticut, and Appellees, who are both citizens of the State of California.

Marei appeals from the March 22, 2012 final order of the District Court, which dismissed the FAC in its entirety with prejudice, and is appealable as of right. *See* 28 U.S.C. §1291. (E.R. 9.) Marei filed a timely notice of appeal on April 19, 2012. (E.R. 11.)

III. STATEMENT OF ISSUES

1. The S.G. and the Department of State submitted an amicus brief in connection with Appellant's petition for certiorari on the issue of the constitutionality of §354.3, in which they stated:

> This case does not involve the application of a state statute or common law of general applicability that addresses matters of traditional state interest and only incidentally touches on foreign affairs prerogatives of the United States Government . . . .
>
> * * * *

> [T]he court of appeals' preemption holding may not be decisive even in this very case, because that court remanded to determine whether petitioner's claim is timely under another California statute of limitations for actions to recover personal property . . . . It is thus possible that on remand petitioner's action will be deemed timely. Two courts of appeals have held that application of general state statutes of limitations to claims seeking recovery of Holocaust-era artwork does not impermissibly intrude upon federal foreign affairs authorities . . . .

(E.R. 521, 532-33). Did the District Court err in holding that, despite this express language in the S.G.'s Brief, he intended that common laws claims be preempted and may not proceed under the general statute of limitations?

2. Was it improper for the District Court to make factual findings on this pre-answer motion to dismiss based solely upon the S.G.'s erroneous factual assumption that the artworks sought in this case were previously the subject of bona fide restitutions proceedings in the Netherlands, and therefore, any lawsuit brought to restitute those artworks to the heirs of the Jewish family from whom they were looted by Nazi Reichsmarschall Hermann Göring in 1940 was preempted?

3. Did the District Court err in holding that Appellant's common law claims for conversion, replevin, and to quiet title, as well as her claims under the Penal Code, were preempted under the foreign affairs doctrine because they conflict with express United States policy, where the District Court determined that

factual assumptions drawn by the S.G. were binding on the Court even though there has been no discovery or evidence beyond the pleadings on the issue of whether the artworks sought in this case were previously the subject of bona fide restitutions proceedings in the Netherlands?

4. Did the District Court mistakenly conclude that this case implicates foreign affairs and must therefore be preempted, when, in fact, to adjudicate this case all the Court must do is determine whether any act since the Nazi looting in 1940 divested Appellant of title to the artworks, or conveyed title to those works to another?

5. Is amended CCP §338(c), the California statute of limitations generally applicable to this case, preempted by the foreign affairs doctrine because, as the court in *Cassirer* divined, the "real purpose" of the amended statute was an "end run" around this Court's decision in *Von Saher I* as to the constitutionality of §354.3, and was intended simply to re-enact that unconstitutional statute in order to extend the statute of limitations for Holocaust-era art claims?

IV. STATEMENT OF THE CASE

A. The Nature Of The Case

Marei brought this action to recover an extraordinary pair of life-size paintings entitled "Adam" and "Eve" by the sixteenth-century artist, Lucas Cranach the Elder (the "Cranachs"). (E.R. 825.) She is the sole heir of the Jewish

art dealer Jacques Goudstikker ("Jacques"). (E.R. 825-26.) Jacques purchased the Cranachs at a public auction in Berlin in 1931. (E.R. 828.) Following the Nazi invasion of the Netherlands in May 1940, the Nazis, led by Hermann Göring, looted Jacques' art gallery of hundreds of artworks, including the Cranachs. (E.R. 830.)

The Cranachs are now in the possession, custody, or control of the Norton Simon Museum of Art at Pasadena (where they are on display) and/or the Norton Simon Art Foundation (collectively, the "Museum"). (E.R. 840.) Marei has demanded that the Cranachs be returned to her and the Museum has refused. (E.R. 843.)

B. The Course Of The Proceedings

Marei's Complaint, filed in 2007, alleged timeliness pursuant to §354.3 and set forth causes of action for replevin, conversion, damages under Cal. Penal Code §496, a judgment declaring Marei to be the lawful owner of the Cranachs, and to quiet title. On July 9, 2007, the Museum moved to dismiss the Complaint pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief can be granted on the grounds that, *inter alia*, §354.3 was unconstitutional as it contravened the foreign affairs doctrine and was therefore preempted. On October 18, 2007, the District Court cancelled oral argument and granted the Museum's motion to dismiss Marei's Complaint in its entirety with prejudice on that ground.

Von Saher v. Norton Simon Museum of Art, No. CV 07-2866-JFW (JTLx), 2007 U.S. Dist. LEXIS 95757 (C.D. Cal. Oct. 18, 2007). The District Court also held that, in the absence of §354.3, Marei's predecessor-in-interest had only three years to bring a claim from the time the Museum acquired the Cranachs in 1971, irrespective of when Marei or her predecessor-in-interest discovered the whereabouts of the Cranachs. *Id.* at *9-10. Marei filed a timely notice of appeal. (E.R. 859.)

On August 19, 2009, this Court issued its decision and order affirming the ruling with respect to the constitutionality of §354.3, but reversing the ruling with respect to the accrual of the generally applicable statute of limitations, and remanded with leave to amend to allege timeliness thereunder. *Von Saher v. Norton Simon Museum of Art*, 578 F.3d 1016 (9th Cir. 2009). En banc reconsideration was denied, but an amended decision and order was issued. *Von Saher I.* The mandate was stayed pending a petition for certiorari to the Supreme Court. (E.R. 858.) Certiorari was eventually denied and the mandate issued. (E.R. 858.)

C. The Disposition Below

Marei filed her FAC on November 8, 2011, setting forth the same causes of action as before. She alleged timeliness pursuant to §338. (E.R. 824.) On December 27, 2011, the Museum moved to dismiss the FAC pursuant to Fed. R.

Civ. P. 12(b)(6) for failure to state a claim upon which relief can be granted on the grounds that, *inter alia*, all of Marei's claims are preempted by the foreign affairs doctrine. (E.R. 856.) Again, the District Court cancelled oral argument and granted the Museum's motion to dismiss Marei's FAC in its entirety with prejudice on the grounds that all of her common law claims are preempted by express federal policy. (E.R. 1, 9.) The District Court did not reach or address any of the other grounds urged by the Museum for dismissal. This appeal followed.

Subsequent to the District Court's decision in this case, the District Court in *Cassirer* held that the general California statute of limitations applicable to this case, §338(c)(3), was preempted by the foreign affairs doctrine.

V. STATEMENT OF FACTS

On May 10, 1940, Nazi troops invaded the Netherlands. (E.R. 829.) Because they were Jewish, Jacques, then the foremost Dutch dealer in Old Master paintings, his wife, Dési, and their infant son were forced to flee for their lives. (E.R. 829.) They left the Netherlands with only a few personal effects, leaving everything else behind, including Jacques' art gallery and all of its assets – among them some 1,200 valuable artworks, including Rembrandts, Steens, Ruisdaels, van Goghs, and the Cranachs – as well as Oostermeer, the Goudstikkers' residence; Nijenrode, a twelfth-century castle; and Herengracht 458, a seventeenth-century canal building in Amsterdam. (E.R. 829.)

Jacques and his family escaped on a ship traveling to South America. (E.R. 829.) Tragically, Jacques died in a shipboard accident on May 16, 1940. (E.R. 829-30.) At the time of his death, Jacques had in his possession a black notebook containing entries describing artworks in the Goudstikker art collection. (E.R. 830.) The Cranachs were listed as having been purchased at the Lepke Auction House and were from the Church of the Holy Trinity in Kiev. (E.R. 830.)

After Jacques' death, the Nazis, led by Göring, looted the assets of Jacques' art gallery through a forced sale to Göring and his henchman, Aloïs Miedl, for a "purchase price" far below their actual value and a promise of protection from threatened "deportation" for Jacques' mother. (E.R. 830-31.) Miedl took Jacques' business and properties. Göring personally took the finest artworks, including the Cranachs. (E.R. 831.)

After WWII, the Allies recovered the Cranachs, along with hundreds of other artworks stolen from the Goudstikker gallery. In accordance with Allied policy, these artworks were returned to the Netherlands with the expectation that they would be returned to their rightful owner. (E.R. 831-32.) Although Jacques' widow, Dési, did recover some works after WWII, she refused to settle her claims to the works taken by Göring, and the Dutch Government retained custody of over 200 such artworks, including the Cranachs. (E.R. 834-36.)

In 1961, Georges Stroganoff-Scherbatoff ("Stroganoff") claimed that the Cranachs had belonged to his family. (E.R. 837.) In fact, the Cranachs came from the Church of the Holy Trinity in Kiev (E.R. 827) and had never been part of the Stroganoff family art collection. (E.R. 828.) Nevertheless, in 1966 the Dutch Government sold the Cranachs to Stroganoff. (E.R. 837.)

In or about 1971, the Museum acquired the Cranachs either from Stroganoff or his agent. (E.R. 838.) The Cranachs have been in the possession of the Museum since that time. (E.R. 840.) Marei discovered that the Cranachs were at the Museum on or about October 25, 2000. (E.R. 840.) Marei demanded that the Museum return the Cranachs to her, but it refused. (E.R. 843.)

In 1998, Marei began her attempts to recover her family's looted artworks in the custody of the Dutch Government through both administrative and judicial proceedings. (E.R. 839.) In 2001, the Dutch Government made the determination that its post-War policies regarding the restoration of Nazi-looted property had been too formal and bureaucratic, and that going forward it would review claims for such property based upon a more policy-oriented approach. (E.R. 841-42.) Following this policy change, Marei submitted a claim for artworks looted from the Goudstikker gallery to the State Secretary of the Dutch Government's Ministry for Education, Culture and Science, which oversees the Dutch Government's restitution policy, and the State Secretary referred the claim to the Dutch Advisory

Committee on the Assessment of Restitution Applications for Items of Cultural Value and the Second World War (the "Restitutions Committee"). (E.R. 842.)

After an intensive review of the historical evidence, the Restitutions Committee advised the State Secretary to restitute to Marei all of the artworks in the custody of the Dutch Government that, like the Cranachs, had been taken from the Goudstikker gallery by Göring. (E.R. 166, 179.) The Restitutions Committee found, and the State Secretary agreed, that the transactions through which Göring and his Nazi collaborators purported to purchase all of Jacques' artworks were involuntary, forced sales. (E.R. 169-70, 187, 196.)

On February 6, 2006, the State Secretary accepted this finding, adopted the advice of the Restitutions Committee, and decided to restitute to Marei 200 artworks looted by Göring from the Goudstikker gallery. (E.R. 196.) If the Cranachs had still been in the custody of the Dutch Government in 2006, they, too, would have been returned to Marei. Désis refusal to settle her claims to the Göring works in the 1950's was vindicated by the 2006 decision, which accepted the Restitutions Committee's findings that, among other things: (a) contrary to the State Secretary's 1998 decision, Désis claim to the Göring works had not been settled in 1952; (b) Dési had refused the Dutch Government's request that she waive the Göring claims; and (c) neither her failure to bring a restitution proceeding for the Göring works in the 1950's nor the 1999 decision of the Court

of Appeals of The Hague precluded restitution of these works in 2006. (E.R. 195-97.)

The Restitutions Committee noted Dési's complaint about unfair treatment at the hands of the Dutch bureaucracy (E.R. 173) and found that "the authorities responsible for restorations of rights or their agents **wrongfully** created the impression that Goudstikker's loss of possession of the trading stock did not occur involuntarily." (E.R. 174) (emphasis added). The Dutch Government also reached a more general conclusion: "Based on our examination of the documents relating to a great number of post-War claims we must describe the way in which the Netherlands Art Property Foundation generally dealt with the problems of restitution as legalistic, bureaucratic, cold and often even callous." *Recommendations Regarding the Restitution of Works of Art,* Ekkart Committee 8 (Apr. 2001), http://www.herkomstgezocht.nl/download/aanbevelingen2en.doc. Thus, it was the Dutch Government's own conclusion that its post-War restitution proceedings were not conducted in good faith.

In 2006, the Dutch Government expressly confirmed that this lawsuit is of no concern to it. (E.R. 28.)

VI. SUMMARY OF ARGUMENT

Based upon its flawed reading of the S.G.'s Brief, the District Court erroneously held that Marei's common law claims (and one statutory claim under

California's Penal Code) for the restitution of her family's property are preempted by the foreign affairs doctrine.[4] First, the District Court incorrectly ignored the S.G.'s express statement that, absent §354.3, the preempted special statute for Holocaust art claims, this case could proceed under California's generally applicable statute of limitations. As shown in Section A below, the S.G. never stated that Marei's common law claims were preempted by U.S. foreign policy, nor did he take the position that the case should be dismissed. Rather, the S.G. stated that the "preemption holding may not be decisive" because Marei's claims could proceed if timely under California's generally applicable statute of limitations. (E.R. 532-33.) It would make no sense for the S.G. to argue that the Supreme Court need not grant certiorari to consider the foreign affairs preemption doctrine as it pertained to the preemption of §354.3, if he had concluded that all common

[4] The Museum made several additional arguments to the District Court, including that §338(c)(3) violates the Due Process Clause and the First Amendment; that Marei's claims are barred by the act of state doctrine; that Marei's claims are time-barred; and that Marei's claims under California's Penal Code should be dismissed. The court below did not reach any of these arguments and there is no basis for this Court to do so now. While it is Marei's position that §338(c)(3) violates neither due process nor the First Amendment, and that all of the claims alleged in the FAC are timely and not barred by the act of state doctrine, these arguments are highly dependent on facts outside of Marei's Complaint. With sufficient development of the record, it will be clear that these additional arguments are also meritless.

law claims would be barred by that doctrine, and not just the statute of limitations then before the Court.

Second, as shown in Section B below, the District Court erred by failing to differentiate between the federal policy set forth in the S.G.'s Brief and assumptions of fact made by the S.G. On this motion to dismiss, it is improper for the court to make any findings of fact, let alone simply accept the S.G.'s recitation of "facts" of which it has absolutely no knowledge.

In connection with his previous analysis of §354.3, the S.G. concluded that it is the foreign policy of the U.S. that, when Nazi-looted artworks were returned to their countries of origin by the Allied forces **and then subjected to bona fide restitution proceedings by the country of origin**, the U.S. must respect those proceedings and not permit review of such determinations by U.S. courts. Even if the S.G. meant to apply this policy to common law claims, he made clear that the mere return of artworks to the country of origin will not bar litigation if the artworks were not subject to bona fide restitution proceedings.

But the S.G. incorrectly assumed that the Cranachs were the subject of bona fide restitution proceedings in the Netherlands, a "fact" that is directly contradicted by Marei's FAC. Relying upon the S.G.'s assumptions of fact – not upon its statement of policy – the District Court found that Marei's claims were preempted. The Court may not simply accept the Government's assumptions of fact,

unsupported by the record, and there is no basis to believe that the S.G. intended the District Court to do so.

Indeed, citing the Report of the Presidential Advisory Commission on Holocaust Assets in the U.S., *Plunder and Restitution: The U.S. and Holocaust Victims' Assets* (2000) (the "PACHA"), the S.G. specifically acknowledged that there were problems with the U.S.'s post-War restitution policy. (E.R. 516.) The PACHA clearly concluded that the policy of returning looted artworks to their countries of origin – so-called "external restitution" – "failed to realize the goal of returning property to the victims who suffered the loss." PACHA at 6. That is why the S.G. made it clear that external restitution to the country of origin after WWII is not sufficient to bar litigation if the artworks were not subject to bona fide "internal restitution" proceedings by the country of origin. (E.R. 517-18, 528.) Whether bona fide restitution proceedings took place in the country of origin is a threshold determination that the courts must make.

The bona fides of the Netherland's actions towards the Goudstikker family after the War are highly disputed. Thus, if the policy set forth in the S.G.'s Brief is applicable where there is no special statute at issue, the question of whether the Cranachs were the subject of bona fide restitution proceedings in the Netherlands is a critical factual determination that must be made in this case. But the District Court failed to accept the allegations in Marei's FAC were true, as it must on a

motion to dismiss, and instead adopted the S.G.'s factual assumptions, despite his having no knowledge of any of the facts relevant to this case.

Third, as addressed in Section C below, the District Court erred in concluding that this case implicates foreign affairs. This case is only about one thing: whether Marei or the Museum has title to the Cranachs. This is an issue that U.S. courts are well suited to adjudicate. It does not involve foreign affairs. Under settled principles of American jurisprudence, a thief can never acquire good title to stolen property and can never pass good title to such property. To determine whether any act that occurred between the looting of the Cranachs by Göring and Marei's demand to the Museum for their return conveyed good title or otherwise divested Jacques' heirs of title to the Cranachs, the courts need not opine on the propriety of Dutch court or administrative decisions. Rather, the U.S. courts need only determine the legal effect of the various actions taken in the Netherlands, including the government's sale to Stroganoff, a task the courts are particularly well suited to perform.

Finally, although the Museum never argued in the District Court that the statute of limitations applicable to this case, §338(c), is preempted by the foreign affairs doctrine, a recent decision by the Central District in the *Cassirer* case so held. Because the Museum will undoubtedly argue that *Cassirer*'s reasoning and ruling should apply here, Section D below addresses the issue.

Amended §338(c)(3) is, unquestionably, a statute of general applicability. By examining the legislative history of the amendment, however, the *Cassirer* court concluded that the purpose of the amended statute was to circumvent the decision in *Von Saher I*, and thereby provide a special statute for Nazi-looted art victims. To reach this conclusion, the *Cassirer* court ignored long-standing rules of statutory construction.

First, a statute may not be held unconstitutional on its face if there are any circumstances under which the statute could be constitutionally applied. Given that at least two cases currently pending in California under amended §338(c) have absolutely nothing to do with Holocaust-era art, the statute can plainly be constitutionally applied; the concerns expressed in *Von Saher I* are not present. And, as the S.G. has recognized, two Circuit Courts of Appeals have held that the "application of general state statutes of limitations to claims seeking recovery of Holocaust-era artwork does not impermissibly intrude upon federal foreign affairs powers," in cases where application of such statutes barred claims. (E.R. 533.) Thus, §338(c) cannot be held unconstitutional as applied. To do so would create an untenable contradiction: generally applicable statutes of limitations that permit Holocaust-era art claims to go forward are unconstitutional, but generally applicable statutes of limitations that preclude such claims are not.

Second, courts may not resort to legislative history to discern a legislature's intent in enacting a statute when that statute's language is unambiguous. Here, although it is conceded that amended §338(c) is a statute of general applicability, the *Cassirer* court improperly looked to the legislative history to support its conclusion that the California Legislature intended to create a forum for Holocaust-era art cases.

VII. STANDARD OF REVIEW

A district court's order granting a motion to dismiss for failure to state a claim pursuant to Fed. R. Civ. P. 12(b)(6) is reviewed *de novo*. *Manzarek v. St. Paul Fire & Marine Ins. Co.*, 519 F.3d 1025, 1030 (9th Cir. 2008); *Leadsinger, Inc. v. BMG Music Publ'g*, 512 F.3d 522, 526 (9th Cir. 2008). A district court's dismissal of a case on federal preemption grounds is also reviewed *de novo*. *Am. Trucking Ass'ns, Inc. v. City of Los Angeles*, 660 F.3d 384 (9th Cir. 2011); *Ojo v. Farmers Group, Inc.*, 565 F.3d 1175 (9th Cir. 2009). All well-pleaded allegations of material fact set forth in the complaint are accepted as true and construed in the light most favorable to the plaintiff. *Manzarek*, 519 F.3d at 1030-31.

VIII. ARGUMENT

A. THE DISTRICT COURT ERRED BY IGNORING THE U.S. GOVERNMENT'S CLEARLY STATED INTENTION THAT THIS CASE BE PERMITTED TO PROCEED UNDER CALIFORNIA'S GENERALLY APPLICABLE STATUTE OF LIMITATIONS

Nothing in the S.G.'s Brief indicates that this case, *in toto*, is preempted by federal foreign policy and therefore cannot proceed. In fact, the opposite is true. The S.G.'s Brief was expressly premised on the fact that this case, at that time, "d[id] not involve the application of a state statute or common law of general applicability that address [] matters of traditional state interest . . . . " (E.R. 521.) Before the Court at that time was §354.3, California's special statute of limitations for Holocaust-era art cases. As the case is now postured, all that is before the Court are state statutes and common laws of general applicability.

The Museum did not argue, and the District Court did not find, that the California statute of limitations now applicable to this case is preempted.[5] Rather, the Museum argued, and the District Court agreed, that the case itself is barred. The S.G.'s Brief did not address the issue confronting the Court now, that is, the preemption of common law claims. The S.G. never took the position that the case should be dismissed. Rather, his sole position was that §354.3 was preempted.

[5] *But see* Point III, *infra*.

Indeed, the S.G. specifically argued to the Supreme Court that it should not grant certiorari on the issue of the preemption of §354.3 because the case could still go forward on remand under California's generally applicable statute of limitations. The S.G. plainly said:

> the court of appeals' preemption holding may not be decisive even in this very case, because that court remanded to determine whether petitioner's claim is timely under another California statute of limitations for actions to recover personal property . . . . It is thus possible that on remand petitioner's action will be deemed timely.

(E. R. 532-33.) The Government did not urge that the case should be dismissed, or expect that it would be, based upon its foreign policy pronouncement.

Doe v. Exxon Mobil Corp., 473 F.3d 345 (D.C. Cir. 2007) is on point. There, the State Department wrote a letter to the district court advising that the ongoing litigation "would in fact risk a potentially serious adverse impact on significant interests of the United States." *Id.* at 347. The defendants argued that this letter mandated dismissal on political question grounds. The Court of Appeals, however, noted that the State Department's letter not only failed to state that the case had to be dismissed, but it specifically referred to "how the case might unfold in the course of the litigation," thus indicating that the State Department had not urged the District Court to dismiss the case. *Id.* That is exactly what happened here.

At footnote six of its decision and order, however, the District Court reasoned that the S.G's statement that this case could proceed under the general statute of limitations "merely" meant "that Supreme Court review would be premature because the Ninth Circuit's preemption holding may not be dispositive." (E.R. 8.) This makes no sense. It would be wholly disingenuous of the S.G. to tell the Supreme Court that it should not grant certiorari to consider a case raising the applicability of the foreign affairs preemption doctrine if it was the position of the S.G. that Marei's common law claims themselves are barred by the foreign affairs preemption doctrine.

B. THE DISTRICT COURT INCORRECTLY DETERMINED THAT FACTUAL ASSUMPTIONS MADE BY THE S.G. WERE TO BE ACCEPTED AND ACCORDED DEFERENCE AS IF THEY WERE A STATEMENT OF POLICY

1. The District Court Confused Findings Of Facts With Statements Of Policy

The District Court's error stems from its inability to differentiate between the federal policy set forth in the S.G.'s Brief, and the application of that policy to the facts of this case. While the explication of its policy is the responsibility of the State Department acting here through the S.G.'s Brief, the application of that policy to the facts of this case – after their determination at trial – is the responsibility of the court. The District Court abdicated its role, not only by adopting the assumptions of fact made in the S.G.'s Brief, but by accepting such

findings of fact on a motion to dismiss, where all of the facts alleged by the plaintiff are presumed to be true.

On page seven of the decision and order, the District Court mischaracterizes Marei's contentions:

> Plaintiff disputes that the Solicitor General has accurately expressed United States foreign policy, and asks the Court to supplant the Solicitor General's statement of current United States foreign policy with her own.

(E.R. 7.) But Marei never disputed the S.G.'s statement of foreign policy or asked the court to supplant the S.G.'s statement of policy with her own. Rather, what Marei argued was that the S.G. could not have intended that all of her claims were precluded under that policy because he concluded that this case could continue under California's general statute of limitations, even though California's special statute of limitations for Holocaust-era art was preempted by the foreign affairs doctrine.

The **policy** was set forth at pp. 16-17 of the S.G.'s Brief as follows:

> The Cranachs were transferred by the United States to the Netherlands in 1946 pursuant to the policy of external restitution . . . . One of the purposes of that policy at the time was to prevent the United States from becoming entangled in difficult ownership questions regarding confiscated property . . . . That policy judgment demonstrates that, from the perspective of the United States, it was the particular nation concerned (here, the Netherlands) that was to have the **immediate** responsibility for determining issues of ownership and

> restitution of, or restoration of rights in, works like the Cranachs.
>
> The court of appeals erred in dismissing the external restitution policy as irrelevant to this case because it "ended" on September 15, 1948—the deadline set by the United States for filing restitution claims . . . . The United States established a deadline to ensure prompt submission of claims and achieve finality in the wartime restitution process. The United States has a continuing interest in that finality **when appropriate actions have been taken by a foreign government concerning the internal restitution** of art that was externally restituted to it by the United States following World War II.
>
> * * * *
>
> **The United States does not contend that the fact that the Cranachs were returned to the Dutch government pursuant to the external restitution policy would be sufficient of its own force to bar litigation if, for example, the Cranachs had not been subject (or potentially subject) to bona fide internal restitution proceedings in the Netherlands.**

(E.R. 527-28) (emphasis added) (internal citations omitted). Marei takes no issue with this policy.

Marei does, however, dispute the factual assumptions made in the S.G.'s Brief regarding the application of this policy. The S.G. said:

> this case concerns artworks and transactions that, consistent with U.S. policies, have already been the subject of both external and internal restitution proceedings, including recent proceedings by the

> Netherlands[6] in response to the Washington Principles. This case does not involve artwork whose existence or provenance has only recently been discovered and has never been the subject of restitutions proceedings.

(E.R. 527.) Clearly, the S.G. assumed that "bona fide internal restitution proceedings" had occurred in the Netherlands. But this is hotly disputed by Marei in her FAC and must be determined by the court after a trial. The S.G.'s assumptions, made in an amicus brief in a case (1) where issue has never even been joined; (2) in connection with a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6); and (3) where neither the court nor the S.G. has a complete record of the facts, are not a statement of U.S. policy to be accepted and applied by the court.

These factual assumptions have no probative value because the S.G. has no knowledge of the facts. This is not a case where the United States has special knowledge due to its role as an actor in the underlying case. *See Corrie v. Caterpillar, Inc.*, 503 F.3d 974, 977-78 (9th Cir. 2007) (finding that the U.S. Government paid Caterpillar for bulldozers sold to IDF was a fact within the Government's knowledge). Nor is this a case where the U.S. Government is passing on or accepting as true a fact provided to it by a foreign diplomatic

[6] The recent proceeding to which the S.G. refers culminated in the restitution to Marei of every Goudstikker artwork looted by Göring that was returned to the Netherlands by the Allies and still in the custody of the Dutch Government. If the Cranachs had still been in the custody of the Dutch Government, they, too, would have been restituted to Marei.

counterpart. *See The Janko*, 54 F. Supp. 240, 241 (E.D.N.Y. 1944). Here, the S.G. had no basis for his assumption that the Cranachs were the subject of bona fide restitution proceedings.

While the Court may take notice of the policy set forth by the S.G., it "may not take judicial notice of the facts that underlie the position of the United States regarding this litigation." *Sarei v. Rio Tinto PLC*, 221 F. Supp. 2d 1116, 1182 (C.D. Cal. 2002). Nor can the Court take judicial notice of the facts recited in Dutch judicial or administrative determinations relating to the Goudstikker collection. Indeed, "[o]n a Rule 12(b)(6) motion to dismiss, when a court takes judicial notice of another court's opinion, it may do so 'not for the truth of the facts recited therein, but for the existence of the opinion, which is not subject to reasonable dispute over its authenticity.'" *Lee v. City of Los Angeles*, 250 F.3d 668 (9th Cir. 2001) (quoting *S. Cross Overseas Agencies, Inc. v. Wah Kwong Shipping Grp., Ltd.*, 181 F.3d 410, 426-27 (3d Cir. 1999)).

2. The U.S. Has Acknowledged The Frequent Failure Of Internal Restitution Proceedings

The S.G. admitted that U.S. post-War restitution policy was generally problematic (E.R. 516), and cited the Presidential Advisory Commission on Holocaust Assets in the U.S., which stated:

> United States authorities generally restituted those victims' assets that came under U.S. control to the

> national government of their country of origin or to international relief or successor organizations, rather than to the individual owner or heir. **This was a pragmatic but flawed solution** to the idealistic aim of returning stolen assets to individuals.
>
> * * * *
>
> There is evidence that the United States **assumed** that its western allies to which it restituted looted assets would return those assets to their rightful individual owners (or the heirs of those owners). **There is little contemporaneous documentation of efforts by the recipient countries to effect individual restitution and no documentation that the United States monitored the process**.
>
> * * * *
>
> While the overall record of the United States is one in which its citizens can legitimately take pride, **even the most farsighted and best-intentioned policies intended to restitute stolen property to its country of origin failed to realize the goal of returning property to the victims who suffered the loss. Indeed, there remain today many survivors or heirs of survivors who have not had restored to them that which the Nazis looted.**

PACHA at 6-8, 12 (emphasis added). The S.G. noted that in response to these identified problems, the U.S. convened the Washington Conference on Holocaust-Era Assets in which forty-four nations, including the U.S., endorsed what have come to be known as the Washington Conference Principles. (E.R. 516-17); *see Proceedings of the Washington Conference on Holocaust-Era Assets* (J. D. Bindenagel ed. 1999), available at http://www.state.gov/www/

regions/eur/holocaust/heac.html (the "Washington Conference Proceedings"). The Washington Conference Principles are a voluntary set of guidelines for the signatory countries to employ to foster the return of Nazi-looted artworks to their rightful owners. *See* Stuart E. Eizenstat, *Imperfect Justice* 193-99 (2003).

The very purpose of the Washington Conference was to address the failings of internal restitution. Thus, in his "Opening Ceremony Remarks," the Chairman of the U.S. Holocaust Memorial Council stated:

> What really shocked the conscience of the world was the discovery that even after the war, **some countries tried to gain materially from this cataclysm by refusing to return to the rightful owners what was justly theirs.** The refusal to respond to these rightful claims was a great injustice, a moral wrong which cannot be ignored . . . . We are here to make sure that these wrongs are corrected in a just and proper manner.

Washington Conference Proceedings at 3 (emphasis added). *See* Eizenstat, *Imperfect Justice* at 189. The recognition that countries of origin did not act in good faith to return artworks to their true owners comports with the S.G.'s explanation of U.S. policy here. Specifically, the S.G. made it clear that external restitution to the country of origin after WWII is not sufficient to bar litigation if

the artworks were not subject to (or potentially subject to)[7] bona fide "internal restitution" proceedings by the country of origin.

Thus, despite the S.G.'s assumption that the Netherlands proceeded in good faith, he certainly was not in a position to make definitive findings with respect thereto. The S.G. left that determination to the court to make after an examination of the merits at trial.

3. There Were Never Any Bona Fide Restitution Proceedings Pertaining To The Cranachs

In any event, the Dutch administrative and court determinations do not support the S.G.'s factual assumptions regarding bona fide internal restitution. As the Third Circuit noted in *Yusupov v. Attorney General*, 650 F.3d 968, 980 (3d Cir. 2011), the court cannot simply accept the Government's statements of fact; rather, the Government's statements "must be supported by the record it makes." *Id.* Here, the S.G. made no record.

In fact, the Cranachs were never the subject of restitution proceedings in the Netherlands. The Dutch Government itself recognized this when, in 2006, it

[7] The S.G. made certain misstatements with respect to the Washington Principles. For example, the S.G. states, "The Washington Principles generally encourage the return to its pre-War owner of art that was confiscated by the Nazis and not subsequently restituted **or available to be restituted through bona fide procedures**." (E.R. 529) (emphasis added). The emphasized phrase, for which the S.G. offers no citation, appears nowhere in the Washington Conference Principles.

(1) returned to Marei all of the artworks that Göring had looted that were still in its custody; and (2) confirmed directly to counsel for the Museum that the Cranachs were not a part of the claim decided in 2006. (E.R. 23, 196.)

As the FAC makes clear, the post-War Dutch Government took the astonishing position that the "contracts" between Göring and a Jewish-owned business – consummated within weeks of the Nazi invasion by unauthorized employees over the objections of Jacques' widow and punctuated by threats to Jacques' aged mother – were **voluntary sales undertaken without coercion.** As a result, the Dutch Government took the position that it had **no obligation** to restore the property looted by Göring. The Dutch Government's position was that, if Dési wanted any looted property returned, she would have to pay for it and she would receive no compensation or credit for the vast amount of property that had simply disappeared, the loss of goodwill, or the profits made by the Nazi collaborators through the use of the Goudstikker gallery. (E.R. 833-34.)

Dési, therefore, concluded that she would not be able to succeed in a restitution proceeding to recover the Göring works returned by the Allies, and brought no such proceeding. Dési never entered into any settlement with the Dutch Government or otherwise waived her rights with respect to the art taken by Göring. Instead, she sought only to obtain whatever settlement she could with respect to the property taken by Miedl so that she could at least recover her home

and some of her personal possessions. In August 1952, she entered into a settlement agreement with the Dutch authorities settling the Miedl claim only (the "1952 Settlement Agreement"). Dési expressly stated in the preamble to the 1952 Settlement Agreement that she was entering into that agreement because of her frustration with the restitution process, her desire to avoid years of expensive litigation, and her dissatisfaction with the fact that the Dutch Government would not compensate her for the extraordinary losses suffered by the Goudstikker gallery during the War at the hands of the Nazis. The Government tried to pressure Dési to make a settlement that covered the Göring theft as well, but she refused. (E.R. 834-36.)

In 1998, Marei began her attempts to recover the looted artworks in the custody of the Dutch Government through both administrative and judicial proceedings. In January 1998, Marei filed a claim with the State Secretary to recover the Goudstikker artworks. The State Secretary rejected the claim, taking the position that the claim was properly handled immediately following WWII. (E.R. 839.) Marei appealed that decision to the Court of Appeals of The Hague and commenced an action in the District Court of The Hague. In December 1999, the Court of Appeals determined that it (a) had no jurisdiction to hear an appeal from a decision of the State Secretary; (b) had no authority to entertain a direct application for restoration of rights as the time to bring such claims expired in

1951; and c) would not exercise its *ex officio* authority to permit such a proceeding because Dési had decided not to bring such a proceeding after the War. (E.R. 839-40.) In June 2000, Marei filed an application with the European Court of Human Rights, which rejected the application as inadmissible. (E.R. 840.) In January 2001, the District Court concluded that it was incompetent to hear Marei's claim because she had elected to challenge the Ministry's decision in the Court of Appeals. (E.R. 840.) None of those proceedings dismissed the claims on the basis that Marei or her predecessor had already participated in a bona fide restitution proceeding. All were determined on procedural technicalities.

Later in 2001, however, the Dutch Government determined that its post-War policies regarding the restoration of Nazi-looted property had been too formal and bureaucratic, and that going forward it would review claims for such property based upon a more policy-oriented approach. Following this change, Marei submitted a claim to the State Secretary, which was then referred to the Restitutions Committee. (E.R. 842.) The Restitutions Committee advised the State Secretary to restitute to Marei all of the artworks in the Dutch Government's custody that, like the Cranachs, had been taken by Göring. The Restitutions Committee found, and the State Secretary agreed, that the transactions through which Göring and his Nazi collaborators purported to purchase all of Jacques' artworks were involuntary, forced sales. (E.R. 842-43.)

The State Secretary specifically found:

> that grounds for restitution exist in this particular case in accordance with the committee's recommendation. In so doing **I am especially mindful of the facts and circumstances relating to the involuntary loss of property and the settlement of this case in the early 1950's as highlighted by the committee in its extensive investigation . . . . With regard to the 'Göring transaction', the Restitutions Committee concludes that Goudstikker had suffered involuntary loss of possession, since the rights to these works were never waived . . . .** Accordingly, it recommends that the application for restitution be granted. I hereby adopt this recommendation.

(E.R. 196) (emphasis added). As the language quoted above makes clear, the **Dutch Government itself concluded that its 1998 statement that the Goudstikker claim was correctly handled after the War was incorrect and was not to be followed**. As a result, 200 artworks looted by Göring that were still in the Dutch Government's custody were restituted to Marei. Had the Cranachs still been in the custody of the Dutch Government in 2006, they, too, would have been returned to Marei. Thus, the S.G.'s reference to the 1998 Dutch restitution proceeding as a basis for his conclusion that the Dutch Government has "found that 'directly after the war – even under present standards – the restoration of rights was conducted carefully'" (E.R 528), is directly contradicted by the Dutch Government's later disavowal of that position.

At the time the Dutch Government made its decision to restitute these paintings to Marei, the Museum, without Marei's knowledge, sent at least two letters to the Dutch Ministry of Education, Culture and Science (the "Ministry"), seeking support from the Dutch Government for the Museum's claim of good title to the Cranachs and its position that the Dutch restitution proceedings that began in the 1990's resolved this claim. But, in the Ministry's response, dated March 31, 2006, the Dutch Government **specifically refused to say** that the Museum had good title to the Cranachs, **specifically refused to say** that the Ministry's 2006 decision had not reversed "the judgment of the Court of the Hague," and **specifically refused to say** that the Ministry's 2006 decision had not reversed its 1998 decision. (E.R. 23.) Instead, the Ministry stated that "[t]he [Cranachs] . . . are not a part of the claim for which I have decided on February 6 of this year to make the return." (E.R. 23.)

Even if the policy enunciated by the S.G. is applicable where only common law claims, and not a special Holocaust statute, are at issue – an improbable assumption given the S.G's conclusion that this case could proceed under California's general statute of limitations – the question of whether the Cranachs were the subject of bona fide restitution proceedings in the Netherlands is a critical factual determination in this case. The District Court, while recognizing that it must accept as true the allegations in the Complaint, and must construe those

allegations in the light most favorable to Marei (E.R. 2),[8] instead adopted the S.G.'s factual assumptions (and the allegations of the Museum), despite the S.G.'s (and the Museum) having no knowledge of any facts relevant to this case.

Plainly, the District Court did not make its own findings of fact on the issue of prior bona fide restitution. First, it could not do so as the District Court may not make findings of fact on a motion to dismiss. *See Campanelli v. Bockrath*, 100 F.3d 1476 (9th Cir. 1996) (District Court cannot "play factfinder" at the 12(b)(6) stage); *Browne v. McCain*, 612 F. Supp. 2d 1125 (C.D. Cal. 2009) (when considering a 12(b)(6) motion "a court does not make factual findings, nor deem material facts undisputed or admitted").

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[8] While acknowledging the standard it must apply, the District Court failed to do so. For example, the District Court writes that the "Dutch Government settled" a claim by Stroganoff "by exchanging the Cranachs and a third painting for a monetary payment." (E.R. 3.) This "fact" is nowhere alleged in the FAC, nor is there a single piece of paper in the record to support this conclusion beyond statements made by the Museum in court filings. In fact, what is alleged is that the Cranachs were sold. This is a substantial difference, as the legal effect of a sale under Dutch law may be quite different from the legal effect of a "settle[ment]" or "exchange." That the District Court chose to mischaracterize the allegations in the FAC in this way is troubling. Plainly, it means that the District Court neither accepted the facts as alleged in the FAC, nor did it construe the allegations in the light most favorable to Marei. Instead, it accepted unsubstantiated "facts" from the Museum's brief, and construed these "facts" against Marei. Where a district court "assumed the existence of facts that favor defendants based on evidence outside plaintiffs' pleadings, took judicial notice of the truth of disputed factual matters, and did not construe plaintiffs' allegations in the light most favorable to plaintiffs," dismissal pursuant to Fed. R. Civ. P. 12(b)(6) is improper. *Lee*, 250 F.3d at 688.

And, even if it were appropriate to do so, the District Court did not have all of the facts before it necessary to make findings of fact. Because this case was decided on a pre-answer motion to dismiss, the District Court did not have a fully developed factual record on the question of whether post-War restitution proceedings in the Netherlands were conducted in good faith. Such a record would have shown, for example, that the post-War Dutch Government took the position that the sale of the assets of the Goudstikker gallery to Göring was voluntary and need not be reversed even though it knew that:

- Dési, who controlled a majority of the voting shares of the Goudstikker gallery, refused to consent to the sale;
- the employees of the Goudstikker gallery who sold its assets did not have the authority to do so and received exorbitant commissions from a Nazi collaborator as a reward for their cooperation;
- the safety of Jacques' mother, who remained in the Netherlands, formed part of the consideration that was paid; and
- the price paid for the paintings was below their actual value.

The facts still to be presented in this case also include:

- the June 4, 1948 affidavit of Louis Jan Van Wagchem, an employee of the Dutch agency charged with handling artworks externally restituted by the Allies, in which he recounts a discussion with the head of that agency: "With

respect to the found GOUDSTIKKER collection, DE VRIES **instructed me never to speak about it to anyone, because otherwise nothing would be left for the museums**" (emphasis added); and

- the November 11, 1964 memorandum by the Head of the Dutch Legislative and Legal Affairs Division regarding Stroganoff's claim of ownership of the Cranach in which he concludes:

> It looks as if no attention needs to be paid to the various phases in the transfer of ownership that took place prior to recuperation after the war. The Enemy Property Decree . . . stipulates that property belonging to an enemy citizen is transferred by law to the State of the Netherlands . . . . The decree leaves the opportunity open for rights of claims of third parties to recuperated enemy property still to be recognized . . . , **but in the case in question that third party could only be the Goudstikker Company N.V. in Amsterdam (in so far as the sale to Göring was enforced) and in any case not MR. STROGANOFF.**

(emphasis added). These crucial facts go squarely to the issue of whether or not the Cranachs were previously the subject of bona fide restitution proceedings, and underscore why such a determination cannot be made on a motion to dismiss.

Finally, the decision and order makes clear that, even if the District Court could have made findings of fact as to any previous bona fide restitution proceedings, it did not do so, but rather blindly accepted the S.G.'s assumption that the Netherlands conducted bona fide restitution proceedings:

> The Court concludes that the United States' policy of external restitution and respect for the outcome and finality of the Netherlands' bona fide restitution proceedings, as clearly expressed and explained by the Solicitor General in his amicus curiae brief, directly conflicts with the relief sought in the Plaintiff's action.

(E.R. 9.) But, it is the role of the Court – on a fully developed factual record – to determine, in accordance with the policy expressed by the S.G., whether the Cranachs were the subject of bona fide restitution proceedings in the Netherlands. The District Court failed to do this, and its decision and order must be reversed.

4. The Policy Set Forth By The S.G. Requires The Courts To Make A Threshold Determination

To further support its erroneous conclusion that Marei seeks to "trump and interfere with United States foreign policy," the District Court cited this Court's decision:

> Moreover, if the Court were to allow Plaintiff's claims to proceed, the Court undoubtedly would be forced to review the restitution decisions made by the Dutch government and courts, including for example whether Plaintiff's claims had in fact been "settled." See *Von Saher*, 592 F.3d at 967 ("In order to determine whether the Museum has good title to the Cranachs, a California court would necessarily have to review the restitution decisions made by the Dutch government and courts."). Such a determination by the Court would seriously undermine the federal government's policy of respecting the finality and outcome of the Dutch government's restitution proceedings and would potentially implicate the act of state doctrine.

(E.R. 9.) But when this Court issued its prior decision and order in this case, it did not have the benefit of the explanation of the federal policy set forth in the S.G.'s Brief.

The S.G.'s Brief says that the fact that the Cranachs were returned to the Dutch Government after the War pursuant to external restitution would not be sufficient to bar litigation if "the Cranachs had not been subject (or potentially subject) to bona fide internal restitution proceedings in the Netherlands." (E.R. 528.) The meaning of that statement is clear: litigation of claims for the restitution of art that was the subject of external restitution would only be preempted by the foreign affairs doctrine if the art was, or could have been, the subject of bona fide restitution proceedings in the country to which external restitution was made.

Thus, the threshold question regarding bona fide restitution proceedings must be answered before any preemption determination can be made. A court (or jury, as factfinder), therefore, must be able to review prior proceedings in the country of origin to make a determination as to whether there was a bona fide restitution proceeding there. Indeed, that is exactly what the court did in *United States v. Portrait of Wally*, 663 F. Supp. 2d 232 (S.D.N.Y. 2009), a leading case involving Nazi-looted art. In that case, the court found that a painting (1) looted by a Nazi agent from a Jewish art dealer in Austria, (2) recovered by Allied troops, and (3) transferred by them to the Austrian Government after the War, was never

properly restituted to the dealer. Rather, the painting had been wrongfully transferred by the Austrian Government to another individual. It was only through careful examination of the facts that occurred in Austria that the court was able to make that determination. *Id.*

In this case, Marei has alleged that there was no opportunity for a bona fide restitution proceeding in the Netherlands after WWII, and that the Government of the Netherlands has admitted this. (E.R. 833-36, 842.) The FAC also alleges that Marei's efforts in the late 1990's to bring claims for the artworks never returned by the Dutch Government were rejected without any review of the merits of the claims and were subsequently disavowed. (E.R. 839-40, 842.) But the District Court wholly ignored these allegations in the FAC and improperly accepted the S.G.'s assumption that the Cranachs were the subject of bona fide restitution proceedings.

C. THE ADJUDICATION OF THE COMMON LAW CLAIMS IN THIS CASE WOULD NOT IMPLICATE FOREIGN AFFAIRS AND THEREFORE CANNOT BE PREEMPTED

Despite the numerous red-herring arguments that the Museum has made in its efforts to keep what is unquestionably the property of Jewish victims of Nazi looting, this case is not about foreign relations, U.S. policy, or challenging decisions of the Dutch Government. This case is about one thing and one thing only: does the Museum have title to the Cranachs or does Marei? That is all this

Court – or any U.S. court – needs to address. As the S.G. stated, the "application of general state statutes of limitations to claims seeking recovery of Holocaust-era artwork does not impermissibly intrude upon federal foreign affairs authorities." (E.R. 533.)

It is a fundamental principle of American law that a thief can never acquire good title to stolen property and, therefore, can never pass good title to such property, even to a good faith purchaser for value. 2 Franklin Feldman *et al., Art Law: Rights and Liabilities of Creators and Collectors*, §11.2.1 (1986) ("neither the thief nor any purchasers through him receive good title"); Dan B. Dobbs, *The Law of Torts* §66 (2001) ("one who purchases converted goods is himself a converter"); 66 Am. Jur. 2d Replevin §26 (2006) ("a subsequent purchaser of stolen property will not acquire valid title to the property even if he was an innocent purchaser"); *see, e.g., Autocephalous Greek-Orthodox Church v. Goldberg & Feldman Fine Arts, Inc.*, 717 F. Supp. 1374, 1398 (S.D. Ind. 1989), *aff'd*, 917 F.2d 278 (7th Cir. 1990) ("a thief never acquire[s] title to stolen property, and cannot pass any right to possession of stolen property to a subsequent transferee, including a *bona fide* purchaser for value").

This fundamental principle has long been applied by California courts.

> [T]he seller of ordinary property can transfer to the buyer no better title than he has himself, and that if such property has been lost by the true owner, or stolen from

> him, one who buys from the finder or from the thief, though he pays full value and buys in good faith, without notice, obtains no title as against the true owner.

Crocker Nat'l Bank v. Byrne & McDonnell, 178 Cal. 329, 332 (1918). *See also Suburban Motors, Inc. v. State Farm Mut. Auto. Ins. Co.*, 218 Cal. App. 3d 1354, 1361 (1990) ("a sale by the thief or any other person claiming under the thief does not vest any title in the purchaser as against the owner, though the sale was made in the ordinary course of trade and the purchaser acted in good faith") (quoting 3 Anderson, Uniform Commercial Code §2-401:61 (3d ed. 1983)); *Naftzger v. Am. Numismatic Soc'y*, 42 Cal. App. 4th 421, 432 (1996); *Recorded Picture Co. [Prods.] Ltd. v. Nelson Entm't, Inc.*, 53 Cal. App. 4th 350, 371 (1997) ("a thief cannot transfer valid title"). *Accord Morgold, Inc. v. Keeler*, 891 F. Supp. 1361 (N.D. Cal. 1995). Put simply, if the Museum derived its title from Göring, it cannot have good title.

Judicial and administrative decisions by the Dutch Government regarding the art looted by Göring from Jacques are relevant in this case for only one reason: to determine whether anything occurred between the looting of the Cranachs by Göring and Marei's demand to the Museum for their return that divested Jacques' heirs of title to the Cranachs. The idea that a U.S. court must somehow pass on the **propriety** of Dutch administrative or court decisions to determine this case is a smokescreen. The U.S. court need only give legal effect to the Dutch law, where

applicable with respect to any intervening transactions. Giving effect to foreign law is well within a court's purview. Indeed, pursuant to the doctrine of comity, a court has discretion to determine whether or not even to honor the "legislative, executive or judicial acts of another nation." *Asvesta v. Petroutsas*, 580 F.3d 1000, 1011 (9th Cir. 2009) (Court of Appeals declined to give effect to Greek court decision).

But that is not necessary here. All that is necessary is to examine each act that took place after the looting by Göring to determine if it transferred title or otherwise divested Jacques of title. Such an inquiry by the courts does not touch on foreign policy, nor does it question the decisions of the Dutch Government. Indeed, it calls upon the U.S. court to apply and respect the decisions of the Dutch Government.

The instant case is not the first time that courts have too quickly concluded that the adjudication of a case was beyond their purview due to foreign policy reasons. In *Zivotofsky v. Clinton*, 132 S. Ct. 1421 (2012), the plaintiff sought to list Israel as his place of birth in his U.S. passport in accordance with the Foreign Relations Authorization Act, but in contravention of State Department policy. The State Department argued, and both the District Court and Court of Appeals held, that the case had to be dismissed as it presented a non-justiciable political question

that would require a U.S. court to decide the political status of Jerusalem. The Supreme Court disagreed.

Rather than requiring the court to make a foreign policy decision, the Supreme Court found that all the *Zivotofsky* case called for was for the court to either apply the law or find the law unconstitutional – both of which are "a familiar judicial exercise." *Id.* at 1424, 1427. The same is true in this case.

D. CALIFORNIA'S GENERALLY APPLICABLE STATUTE OF LIMITATIONS IS NOT PREEMPTED BY THE FOREIGN AFFAIRS DOCTRINE

1. The Court Of Appeals May Entertain Arguments Not Made In The District Court

"As a general rule, appellate courts will not consider an issue unless it was *raised and considered by the trial court*. This rule ensures that the parties have the opportunity to offer to the factfinder all the evidence they believe relevant to the issues." Goelz & Watts, *Rutter Group Practice Guide: Federal Ninth Circuit Civil Appellate Practice* 7:19 (The Rutter Group 2012) (citing *Singleton v. Wulff*, 428 U.S. 106, 120 (1976); *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 487 (2008)). In light of this generally accepted principle, Marei does not address here the several additional arguments raised by the Museum below, but on which the District Court did not rule. This is in keeping with the appeal in *Von Saher I*. In its motion to dismiss brought in 2007, the Museum had made several arguments as to why this

case should be dismissed, but the District Court ruled on only one, and the parties similarly limited their argument on appeal. On remand in 2011, the Museum again moved to dismiss on several grounds, and again, the District Court ruled on only one. That sole ruling is addressed above.

One thing the Museum did not argue to the District Court in its 2011 motion to dismiss is that §338(c)(3), California's newly amended statute of limitations generally applicable to claims for the recovery of stolen art and items of cultural significance, is preempted by the foreign affairs doctrine. The Museum only argued that Marei's common law claims were preempted by that doctrine. After the District Court's decision in this case in March 2012, however, another judge in the Central District of California ruled in the *Cassirer* case that amended §338(c)(3) was preempted. In *Cassirer* the court found that, "[a]lthough the statute on its face does not mention Holocaust-era art thefts, the amendments were enacted shortly after the Ninth Circuit overturned a functionally equivalent statute expressly enacted to allow recovery of Holocaust-era artwork." *Cassirer* at 3. The *Cassirer* court held that the newly amended statute of limitations was preempted by the foreign affairs doctrine in accordance with this Court's decision in *Von Saher I.*

It continues to be Marei's position that her claims would be timely under §338(c), even before it was amended (*see Von Saher I* at 968). In the District

Court, Marei demonstrated that her claims would be timely under original §338(c) and amended §338(c). Insofar as the District Court did not rule on the issue of timeliness under §338(c), however, the Museum will now undoubtedly argue that *Cassirer*'s reasoning and ruling should apply here to bar Marei's claims.

The Court of Appeals may consider on appeal an issue not raised in the district court if it is "purely one of law." Goelz & Watts at 7:108. Moreover, appellate courts have discretion to address an issue raised for the first time on appeal if it arises due to a change in the law. *Id*. at 7:107. The *Cassirer* decision may be such a change. Given the likelihood that it will be raised by the Museum in its opposition, Marei does not want to be in the position of responding to the *Cassirer* decision only in a reply brief, and therefore addresses that decision herself. If the Museum chooses not to pursue this argument in its opposition brief, the Court may disregard this point of Marei's brief. In any event, this Court will soon be confronted with the *Cassirer* decision, as a notice of appeal has already been filed therein.

2. Amended §338(c) Is Not Unconstitutional On Its Face And Cannot Be Unconstitutional As Applied

In August 2010, the California Legislature voted unanimously to amend §338(c) to provide, in relevant part, that:

> (3) (A) Notwithstanding paragraphs (1) and (2), an action for the specific recovery of a work of fine art

> brought against a museum, gallery, auctioneer, or dealer, in the case of an unlawful taking or theft, as described in Section 484 of the Penal Code, of a work of fine art, including a taking or theft by means of fraud or duress, shall be commenced within six years of the actual discovery by the claimant or his or her agent, of both of the following:
>
> (i) The identity and the whereabouts of the work of fine art. In the case where there is a possibility of misidentification of the object of fine art in question, the identity can be satisfied by the identification of facts sufficient to determine that the work of fine art is likely to be the work of fine art that was unlawfully taken or stolen.
>
> (ii) Information or facts that are sufficient to indicate that the claimant has a claim for a possessory interest in the work of fine art that was unlawfully taken or stolen.
>
> (B) The provisions of this paragraph shall apply to all pending and future actions commenced on or before December 31, 2017, including any actions dismissed based on the expiration of statutes of limitation in effect prior to the date of enactment of this statute if the judgment in that action is not yet final or if the time for filing an appeal from a decision on that action has not expired, provided that the action concerns a work of fine art that was taken within 100 years prior to the date of enactment of this statute.

The *Cassirer* court found that this legislation was preempted by the foreign affairs doctrine for the same reason that §354.3 was held preempted in *Von Saher I*. Specifically, the *Cassirer* court, after scouring the legislative history of the amendment, concluded that:

> the legislation was drafted in response to the *Von Saher* decision; the "idea" for the legislation came from Von Saher's counsel who had previously represented Cassirer in state litigation; and the legislative history of the amendment to Section 338(c) expressly notes that the legislation would assist a class of plaintiffs "that the Legislature has already intended to protect." Thus, while Amended Section 338(c) was drafted to create the appearance that it was intended solely to address an area of "traditional state responsibility," the scope and content of the legislation and the context in which it was enacted suggest otherwise.

Cassirer at 29. So, despite admitting that the amended statute is, on its face, one of generally applicability, the *Cassirer* court found:

> that the "real purpose" behind the amendments to Section 338(c) is to "create a friendly forum for litigating Holocaust restitution claims, open to anyone in the world to sue a museum or gallery located within or without the state." *Von Saher*, 592 F.2d at 965. In short, no suggestion is made in the text or statute, in its legislative history, or in the Parties' arguments that other specific classes of plaintiffs will in fact benefit from the amendments. Accordingly, the Court concludes that, in amending Section 338(c), California has legislated beyond its traditional competence.

Cassirer at 31. In the face of the plain language of §338(c)(3), which makes it generally applicable, the *Cassirer* court nevertheless held that:

> the California Legislature cannot do an end run around *Von Saher* by enacting legislation which, though worded differently in an attempt to appear of general applicability, has the identical purpose as the invalidated Section 354.3 of the California Code of Civil Procedure. The Court therefore concludes that amended Section

> 338(c) is preempted under the reasoning of *Von Saher* . . . .

Cassirer at 4. The *Cassirer* court's decision was wrong.

a. A Statute May Not Be Struck Down As Facially Unconstitutional When Circumstances Exist Under Which It Would Be Valid

Despite the fact that amended §338(c) applies to any art theft occurring between 1910 and 2017, the *Cassirer* court concluded that the amendment's "real purpose" was to "create a friendly forum for litigating Holocaust restitution claims," and was therefore unconstitutional under this Court's analysis of §354.3. *Cassirer* at 26-27 (quoting *Von Saher I* at 964-65). In coming to this conclusion, the *Cassirer* court ignored longed-settled rules of statutory construction.

First and foremost, a party "can only succeed in a facial challenge by 'establish[ing] that no set of circumstances exists under which the Act would be valid,' i.e., that the law is unconstitutional in all of its applications." *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449 (2008) (quoting *United States v. Salerno*, 481 U.S. 739, 745 (1987)). "[A] generally applicable statute is not facially invalid unless that statute 'can *never* be applied in a constitutional manner."' *United States v. Kaczynski*, 551 F.3d 1120, 1124-25 (9th Cir. 2009). This rule "applies with full force," in "cases involving federal

preemption of a local statute." *Sprint Telephony PCS, L.P. v. Cnty. of San Diego*, 543 F.3d 571, 579 (9th Cir. 2008).

There are many circumstances where amended §338(c) would apply that have nothing to do with Holocaust-era art claims. The amended statute of limitations applies to any items of artistic or cultural significance. For example, a national history museum could receive a claim from a landowner from which dinosaur bones in the museum's collection were excavated or an anthropology museum could receive a claim regarding Native-American crafts.[9] A statute of limitations extending the time to bring such claims would not be preempted by the foreign affairs doctrine under this Court's *Von Saher I* decision. In fact, the very legislative history that the *Cassirer* court examined to conclude that "no suggestion is made . . . . that other specific classes of plaintiffs will in fact benefit," (*Cassirer* at 31) shows that the Santa Barbara Museum of Natural History sent a letter expressing its understanding that the new statute would affect it, demonstrating the statute's applicability beyond Holocaust-era art. (E.R. 651.)

Furthermore, this case and *Cassirer* are not the sole cases currently pending in California under the new statute of limitations. For example, *Western Prelacy of*

[9] Even a cursory review of, for example, the website for the Art Loss Register (www.artloss.com) shows that stolen artworks, with no hint of any Holocaust provenance issues, are almost routinely found by galleries and auctioneers, many of whom use the registry to keep from dealing in stolen goods.

the Armenian Apostolic Church v. The J. Paul Getty Museum, No. BC438824 (Super. Ct. Los Angeles Cnty. July 8, 2011) (suit for restitution of illuminated gospel pages to Armenian Church) and *Raffaelli v. Getty Images, Inc.*, No. 2:12-cv-00563-CAS-PJW (C.D. Cal. Apr. 26, 2012) (suit for stolen photographs from the 1970's), which were both brought under amended §338(c), plainly do not involve Holocaust-era art, and this Court's decision in *Von Saher I* would not cause amended §338(c) to be preempted in either of those cases. The only possible conclusion is that amended §338(c) is not facially unconstitutional.

b. The Cassirer Court Overstepped Its Authority When It Ignored The Plain Language Of Amended §338(c) And Instead Made Conclusions Regarding Legislative Intent

Amended §338(c)(3) is not ambiguous, no one has argued that it is ambiguous, and neither the *Cassirer* court nor any other court has found that it is ambiguous. Rather, the *Cassirer* court looked to the legislative history of amended §338(c)(3) to support its conclusion that, despite the unambiguous language of the amended statute, it was the intent of the California Legislature to create a forum for Holocaust-era art cases. In doing so, the *Cassirer* court overstepped its authority.

Courts may not "resort to legislative history to cloud a statutory text that is clear." *Ratzlaf v. United States*, 510 U.S. 135, 147-48 (1994). "When the words of a statute are unambiguous . . . 'judicial inquiry is complete.'" *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 254 (1992) (citation omitted). "'[I]t is ultimately the

provisions of our laws rather than the principal concerns of our legislators by which we are governed.'" *Cooper Indus., Inc. v. Aviall Servs., Inc.*, 543 U.S. 157, 167-168 (2004) (quoting *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79 (1998)). "Where, as here, the statutory language is clear and its provisions can be construed in a consistent workable fashion, resort to legislative history to determine what may have been inchoate congressional intent is inappropriate." *Valentine v. Mobil Oil Corp.*, 789 F.2d 1388, 1391 (9th Cir. 1986).

This black letter rule of statutory construction applies when courts are reviewing the constitutionality of a statute. For example, in *National Ass'n of Manufacturers v. Taylor*, the plaintiff argued that the Honest Leadership and Open Government Act of 2007 was an unconstitutional violation of the First Amendment. 582 F.3d 1 (D.C. Cir. 2009). More to the point, the plaintiff maintained that Congress' true purpose in enacting the statute was to require disclosure of participants in "stealth coalitions." *Id.* at 11. But, the court noted that the statute does not refer to stealth coalitions. To the extent stealth coalitions were referenced in the legislative history, the court concluded that "[a]t best, these statements identify a purpose of the section, not its only purpose." *Id.* at 12. The D.C. Circuit recognized that it could not resort to legislative history to suss out the intent of a statute whose text was clear. *Id.* (citing *Ratzlaf*, 510 U.S. at 147-48). The same is true here.

In *ApolloMedia Corp. v. Reno*, the plaintiff sought a declaratory judgment that portions of the Communications Decency Act of 1996 were unconstitutional. The plaintiff argued that the statute could be applied to any "indecent" communication and therefore violated the First Amendment, whereas the government argued it would only apply to "obscene" language. 19 F. Supp. 2d 1081 (N.D. Cal. 1998), *aff'd* 526 U.S. 1061 (1999). The court, recognizing that, when the language of a statute is clear, "the court should look no further in ascertaining its meaning," found the statute constitutional. *Id.* at 1089. *See also Wallach v. Crawford*, No. 04CV216 BTM (WMC), 2005 U.S. Dist. LEXIS 43700 at *34 (S.D. Cal. Mar. 29, 2005) ("Insofar as Plaintiffs contest the constitutionality of §343-2(a)(2-5), Plaintiffs have not demonstrated any ambiguity in the language of the statute or its individual subsection requirements. Section 343-2(a) is clear on its face in what it requires for a labeling exemption . . . . Thus, the Court need not belabor an inquiry into the congressional intent as it applies to Plaintiffs' first cause of action").

In the *Cassirer* case, the court went beyond its authority, looking to the legislative history of amended §338(c) to ascertain the intent of the California Legislature, rather than simply accepting the plain language of the statute. Indeed, the very fact that the California Legislature chose to amend §338(c) after this Court's decision in *Von Saher I*, evidences the Legislature's desire to change the

meaning of the law to preserve its constitutionality. *O'Brien v. Dudenhoeffer*, 16 Cal. App. 4th 327, 335 (1993) ("[a]n amendment materially changing a statute following a court decision interpreting the statute in its original form is to be regarded as an indication of legislative intent to change the meaning of the law"); *Arnall v. Superior Ct.*, 190 Cal. App. 4th 360, 368 (2010) ('"when the Legislature undertakes to amend a statute which has been the subject of judicial construction[,] . . . it is presumed that the Legislature was fully cognizant of such construction, and when substantial changes are made in the statutory language[,] it is usually inferred that the lawmakers intended to alter the law in those particulars affected by such changes'") (citations omitted).

Here, to the extent the California Legislature could be seen as responding to the decision in *Von Saher I*, it must be assumed that the Legislature was aware that any attempt to create a forum for Holocaust claims or to address inquiries arising from war would be unconstitutional and, therefore, this could not have been the intent of the legislation. The *Von Saher I* court specifically noted that §354.3 did not apply to all claims for stolen art. *Id*. at 964. Amended §338(c)(3) does. Indeed, in light of the Legislature's awareness of the *Von Saher I* decision, the only conclusion can be that the Legislature intended not to pull an "end-run" around *Von Saher I*, but rather to create a statute that would not run afoul of that decision while fulfilling the stated goals of (1) clarifying the meaning of the word

"discovery" within the statute of limitations (E.R. 576-77, 581, 584-85, 591), (2) expanding the limitations period because of the unique problems associated with claims for stolen art (E.R. 577, 582, 584-85, 591), and (3) ensuring that museums and galleries doing business in or with California are not trafficking in stolen goods. (E.R. 577, 582, 594.)

c. Section 338(c) Is Not Unconstitutional As Applied

Having shown that §338(c) is not facially unconstitutional, it begs the question whether it is unconstitutional as applied. The simple answer, already given by two other Circuit Courts of Appeals, and recognized by the State Department and Justice Department, is that it is not. In *Seger-Thomschitz*, 623 F.3d 1 and in *Seger-Thomschitz*, 615 F.3d 574, the heir of an original owner of Nazi-looted art argued that a general state statute of limitations, applicable to claims for the recovery of such property, was preempted by federal foreign policy. The First Circuit held that "[t]he enactment of generally applicable statutes of limitations is a traditional state prerogative, and states have a substantial interest in preventing their laws from being used to pursue stale claims." 623 F.3d at 13-14. The First Circuit specifically noted that the statute of limitations at issue did not single out Holocaust claims, but rather was generally applicable. *Id.* The same is true of §338(c). Similarly, the Fifth Circuit, in rejecting the same preemption argument, noted that the state's prescription statute applied generally and not just

to Holocaust victims or Nazi-looted art. 615 F.3d at 579. Again, the same is true of §338(c).

The S.G.'s Brief cited the two *Seger-Thomschitz* decisions: "Two courts of appeals have held that application of general state statutes of limitations to claims seeking recovery of Holocaust-era artwork does not impermissibly intrude upon federal foreign affairs authorities." (E.R. 533.) It goes without saying that a generally applicable statute of limitations that would happen to permit a Holocaust-era art claim could not possibly be preempted by the foreign affairs doctrine when generally applicable statutes of limitations that preclude such claims are not.

IX. CONCLUSION

For all of the foregoing reasons, Marei respectfully requests that the March 22, 2012 Order of the District Court dismissing her case be reversed and that the case be remanded so that adjudication of her claims may proceed.

Dated: October 1, 2012 Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I, Darlene Fairman, attorney for Appellant MAREI VON SAHER hereby certify under penalty of perjury that this brief complies with Rule 32(c)(2) and Ninth Circuit Rule 40-1. The brief is proportionally spaced, has a typeface of 14-points and contains 13,890 words.

Dated: October 1, 2012

HERRICK, FEINSTEIN LLP

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STATEMENT OF RELATED CASES

The same or closely related issue presented in Argument VIII, Subsection D of this brief is presented in *Cassirer v. Thyssen-Bornemisza Collection Foundation*, No. 12-56159 (9th Cir. 2012).

CERTIFICATE OF SERVICE

I hereby certify that on October 1, 2012, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/ Stephen Moore